Tom Ryan Distributors, Inc. *and* Local 332, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–33776 and 7–CA–34342

July 28, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On December 10, 1993, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Tom Ryan Distributors, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent asserts that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the administrative law judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Furthermore, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further contends that the judge erred in finding that the Federal mediator attended only one of the bargaining sessions that the parties held. Our review of the record discloses that the evidence is inconclusive as to whether the Federal mediator was present for a second time on September 10, 1992, as the Respondent claims. Nevertheless, even assuming that the judge's factual finding on this point was erroneous, we find that the misstatement is insufficient to affect our ultimate conclusions here.

Dennis Boren, Esq., for the General Counsel.
Robert Vercruysse, Esq. and *Lynne Deitch, Esq.*, of Detroit, Michigan, for the Respondent.
Francis J. Kortsch, Esq., of Troy, Michigan (at trial), and *Wayne A. Rudell, Esq.*, of Detroit, Michigan (on brief), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried from July 12 to July 15, 1993, in Detroit, Michigan. The consolidated complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by implementing its final contract offer on September 14, 1992, in the absence of a good-faith impasse with the Charging Party Union (the Union), and by failing and refusing to provide information requested by the Union on November 12, 1992, that was necessary and relevant to the Union's bargaining efforts. The Respondent filed an answer denying the essential allegations in the complaint, although it conceded the necessity and relevance of the Union's November 12 information request. I have read and considered the briefs submitted by all parties, which I received on November 10, 1993, after two filing extensions.

Based on the entire record, including particularly the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL MATTERS

Respondent, a corporation with an office and place of business in Flint, Michigan, is engaged in the wholesale distribution of alcoholic and nonalcoholic beverages. During a representative 1-year period, Respondent purchased beverages valued in excess of $50,000 from points outside Michigan and caused them to be shipped to its facility in Flint. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent and the Union have had a bargaining relationship and successive collective-bargaining agreements since about 1957. The contractual unit, and that stipulated as appropriate within the meaning of the Act, is described as follows:

> All full-time and regular part-time driver/salesmen, helpers, semi-drivers, pre-sell drivers, and beverage warehousepersons, including hi-lo operators, hand loaders, mechanics, and reclamation employees employed by Respondent at its Flint facility; but excluding guards and supervisors as defined in the Act.

The most recent bargaining agreement between the parties was effective from July 16, 1989, through July 15, 1992.

Under that agreement, Respondent's operation was divided into four departments or divisions, each of which was governed by departmentwide seniority. The largest number of Respondent's 72 employees—28 driver-salesmen, 2 empties drivers, 18 warehousemen and 1 semi-driver—worked in the delivery department, also known as the A-B, Anheuser-Busch, or beer division. It was so identified because it primarily handled the sale and delivery of Anheuser-Busch and Budweiser products. Sales and deliveries in the beer division were made by driver-salesmen, who earned the most of any of the unit employees. They actually sell the product from

their trucks and secure orders and payments from the customer on site.[9]

The remaining departments included the beverage division, whose function is to distribute wine, waters, sodas, and export beers. It is composed of six drivers and seven warehousemen. Deliveries in the beverage division are effected both by driver-salesmen, who operate much as those in the beer division, and by so-called presell drivers, who deliver products previously sold to customers by someone else. The reclamation department, composed of six employees, basically reprocessed and recycled empties from customers which had been returned by the drivers. The mechanics department had four employees.

Drivers, except for the semi-driver, are paid by commission on the basis of cases delivered or sold. The remainder of the employees are hourly paid. The 1989–1992 contract contains a weekly guarantee of 40 hours pay for the hourly employees, except for reclamation employees or seasonal employees, as well as a dollar-based weekly or daily guarantee for commission-paid drivers. That contract also effectively froze beer division commissions for 3 years.

The parties first met to negotiate a new agreement on June 8, 1992, at Respondent's facility where all the subsequent meetings took place. The Respondent was represented by its attorney, Robert Vercruysse, its operations manager, Tim Kennedy, its general sales manager, Paul Stoba, and its office manager, Cheryl Caleca; the Union's bargaining team was composed of Business Agent Rodney Eaton, Union Steward Kelly Stebbins, who was an employee, Mark Goodar, another employee, and Charles Hutchinson. At this meeting, Vercruysse and Eaton, the chief spokesmen for their sides, set forth their respective positions, but did not exchange proposals. Respondent's expressed position was that it wanted to lower labor costs in order to increase profitability for owner Mike Ryan who had recently purchased the business from his mother. The Union expressed an interest in widening the present departmental seniority and in having reclamation employees participate in the grievance procedure and the pension program, which were barred to them under the existing contract.

The parties met next on June 19. At this meeting the parties did little more than exchange and describe their respective proposals. The Union's proposal included an increase in the weekly drivers' guarantee from $450 to $550, an increase in commissions from 45-1/2 cents to 58 cents per case for beer and wine and from 30 cents to 40 cents for other products in the beverage division, parity in pay between warehouse employees in the beverage and beer divisions, resulting in a 60-cent-per-hour increase for the seven beverage warehousemen, an increase in pay for mechanics, increases in empties commissions and pensions, personal days with pay, full reimbursement for uniforms, sick pay applicable from the first day of an illness, limits on stops per day, and other improvements.

The Respondent's proposal included the right to implement a so-called bulk sales provision and to add presell to the beer division. The bulk sales provision would create bulk sales routes for large accounts presently serviced by different drivers. The beverages would be presold, preloaded and delivered by a driver on pallets. Bulk sales drivers were to be paid on an hourly basis. The presell provision contemplated a lower commission for those drivers. These proposals resulted in a diminution of existing pay as well as jobs.

Respondent also proposed a new two-tier commission schedule as between premium and nonpremium beers, effectively reducing existing commissions. The proposal also reduced or eliminated existing commissions for empties and so-called old or out-of-date beer. It also eliminated other benefits in the existing contract, notably the 40-hour weekly guarantee for hourly paid employees. The proposal also increased the number of hours required before an employee qualified for insurance benefits, eliminated daily overtime for work in excess of 8 hours, and required overtime to be paid only on hours over 40 per week. Respondent wanted employees for the first time to pay part—20 percent—of their medical insurance premium. In addition, the proposal sought reductions in holidays from 8 days to 6 days, authorization to use temporary employees to perform unit work, doubled the so-called washout period within which discipline could be counted against employees, increased the retirement age for a full pension, and sought other concessions from the Union.

The initial proposals exchanged by the parties reflected the Union's retention of at least the basic pay and work formulations of the existing contract with significant increases. Respondent wanted some conceptual changes—including bulk sales and presell in the beer division—and significant decreases in compensation and benefits.

The parties' third session took place on June 24 and lasted some 4 hours, excluding time spent for lunch. The parties reached tentative agreement on some minor matters such as the payment of sick leave from the first day of an illness, providing super seniority for stewards only for layoffs and adding handicap to the list of subjects about which discrimination was prohibited. Vercruysse rejected almost all of the Union's substantive proposals and withheld comment on others. The parties did, however, devote some time to discussing Respondent's presell proposal in conceptual terms. Eaton made a request that Respondent furnish examples of how presell routes would operate and Respondent agreed to do so. At the end of this meeting, Vercruysse expressed the hope that the parties would have a new contract by July 15, the expiration date of the existing one. Eaton expressed his doubts that this could be accomplished.

The parties next met on July 3; this meeting lasted about 5 hours, including time for lunch. The parties concentrated primarily on Respondent's presell and bulk sales proposals which were still general in nature. Vercruysse stated that for every two presell routes implemented there would be a loss of one driver-salesman. The Respondent also distributed two documents that reflected examples of possible presell routes effectively combining existing driver-salesmen routes. The Union expressed concern over the loss of jobs, as well as its view that, under present contract rates, the drivers would make less money. Respondent's position throughout negotiations was that the driver-salesmen were being paid too much money.

Respondent also distributed a document in connection with its bulk sales proposal titled, ''volume ranking report.'' The document purported to identify Respondent's top customers

[1] Respondent has an exclusive distribution arrangement with Anheuser-Busch for Budweiser and related products in Genesee and Lapeer Counties, which includes the city of Flint. Respondent controls over 60 percent of the beer market in these counties.

in terms of sales volume; no volume or dollar sales figures were listed. This was to provide an example of stops that could be serviced under the bulk sales concept.

The parties reached no tentative agreements at this meeting. And there was no withdrawal or alteration of proposals.

The fifth bargaining session took place on July 14. It lasted about 5 hours, excluding the time spent at lunch. The parties again discussed Respondent's presell and bulk sales proposals. Respondent took a broad position on bulk sales, asking for discretion in the number of bulk sales routes it would initiate. It also indicated that it was exploring the option of purchasing additional equipment to accommodate the presell and bulk sales concepts it was proposing. The parties reached no agreement on these issues, but did reach some tentative agreements. For example, the parties agreed to combine the beer and beverage departments, with the exception of the semi-driver, effectively granting the Union's request to broaden the existing department-wide seniority; mechanics and reclamation remained separate departments. In addition, Respondent agreed to withdraw its demand that driver-salesmen not be paid for handling old beer. The parties also agreed on the Union's proposal regarding working before and after a holiday. They also agreed to extend the existing contract on a day-to-day basis after its expiration date.

The parties met again the next day, July 15, for 5 hours, excluding time for lunch. At this meeting, the Union dropped or withdrew some of its proposals. For example, it withdrew its proposal for a three-case minimum per stop and reduced its per-week guarantee proposal by $25. In addition, it made presell and bulk sales proposals for the first time. It agreed in principle to six presell routes over the 3-year term of a new contract; Respondent countered with 13, including 4 in the fall of 1992.[2]

On bulk sales, the Union made a proposal limiting the number of stops to several large customers with the use of mechanical equipment; it also agreed to drop the commission rate for bulk sales 10 cents per case. The Respondent rejected the Union's proposal because it wanted no limitations on bulk sales routes.

The parties reached no significant tentative agreements at this meeting, although they did agree to keep the existing contractual washout period for discipline. At the end of this meeting, Vercruysse suggested inviting a mediator to the next session, and the Union agreed.

The seventh bargaining session took place on August 6. The parties were joined by Federal Mediator Pat Dean and the meeting began at about 3:45 p.m. At this meeting Respondent presented a redrafted written proposal to the Union reflecting its present demands, together with tentative agreements reached to that date. This draft reflects other concessions to the Union such as a return to the existing eight holidays from Respondent's original position of six holidays.

The Union met separately with Dean, and transmitted, through her, an oral comprehensive counterproposal. This included the previously offered bulk sales proposal and an expanded presell proposal increasing the number of routes from six to nine over the term of the contract. The latter included a $330 weekly base plus a 30-cent commission, a decrease from both its commission proposal and the existing commission. The Union also dropped another $25 from its weekly guarantee proposal, bringing it down to $500. It also dropped its driver-salesman commission increase to one cent per year, provided wage increases of 50 cents, 40 cents, and 40 cents per hour for each year of the contract for warehouse employees and $1 per year for mechanics and reclamation employees. The Union also retained its 8-hour overtime proposal and its guarantee proposal for warehousemen and mechanics, and it asked for elimination of Respondent's temporary employee proposal. The Union also asked that Respondent drop its proposal to increase required hours for benefits, except for reclamation employees. After making this proposal to Dean, the union negotiators broke for dinner.

Dean presented the Union's counterproposal to Respondent's negotiators. They rejected it, and Dean transmitted the Respondent's rejection to the Union negotiators after they returned from dinner.

The parties then met face-to-face. Vercruysse told the Union negotiators to get their pencils ready because he was presenting them with Respondent's final offer. He set forth the Respondent's position orally and followed it up the next day with a written proposal reflecting this final offer along with the tentative agreements reached to this point.

The Respondent's final proposal included 13 presell routes and an unlimited right to implement bulk sales routes, the payment of the bulk sales drivers was changed from an hourly rate to a commission rate. Respondent meliorated its medical insurance proposal to pay 100 percent of the premiums in the first year and 50 percent of any increase in subsequent years. Respondent also altered its proposal on warehousemen's pay. Although this resulted in a 60-cent-per-hour raise for the 7 beverage warehousemen, the 18 beer warehousemen received no raise.

The remainder of the final proposal included slight improvements but still retained a regressionary cast. Respondent still drew a distinction in commissions between premium and nonpremium beers, but it was willing to increase commissions a penny per year for the second and third years of the contract. On presell in the beer division, this still meant a substantial decrease from existing commissions. On bulk sales, Respondent offered 18 cents, 19 cents, and 20 cents in each year of the contract. Its proposal on empty case commissions increased its previous offer from 6 to 7 cents, but it was still 2 cents lower than the existing rate. Its empty bag payment was likewise still less than the payment in the existing contract. Finally, Respondent made no change in its demands for concessions on overtime pay, hours worked for benefits, the elimination of the 40-hour weekly guarantee, and other matters.

After being presented with the Respondent's final offer on August 6, Eaton stated that he did not think it was a good offer and commented that he believed that there was a lot more room for movement. He decried the regressionary na-

[2] It is unclear whether this was the first time Respondent specified the number of presell routes it wanted. None of its written proposals contained such specificity until the final one dated August 7; there a separate side agreement authorized 13 presell routes over the term of the agreement. Although there was some testimony that that number may have popped up earlier in negotiations, most of the discussion about presell to this point was general. When Vercruysse was cross-examining Stebbins, he admitted that the first time anything specific about the number of presell routes was offered by Respondent was in its August 6 proposal. And Kennedy admitted that, before August 6, presell and bulk sales were only discussed ''conceptually.''

ture of the offer, but, upon Vercruysse's insistence, agreed nevertheless to submit the offer to a vote of the membership. Vercruysse also stated that, if the membership did not like the offer, Respondent ''could find a lot of other people'' who ''would be glad to work under those wages and conditions.'' The meeting ended at about 11 p.m.[3]

On August 30, the unit employees voted 69 to 0 to reject Respondent's final offer. Respondent was notified of the rejection, and the parties agreed to meet again.

The parties met for their eighth session on September 10. The meeting lasted about 3 hours, excluding the time expended for lunch. Eaton explained the reasons for the employees' rejection of Respondent's offer. He said that the proposal contained decreases in commissions, copayments for health insurance, loss of the 40-hour workweek guarantee, and increases in eligibility hours for benefits. He also said that the employees did not like the presell and bulk sales proposals. Vercruysse then asked whether the Union had a counterproposal. After a caucus, the union negotiators returned and, through Eaton, made a counterproposal. That counterproposal—made orally—essentially dropped most of the Union's remaining contract demands. The Union proposed a 3-year wage freeze under the present contract, along with tentative agreements reached to this point. The Respondent's negotiators then caucused.

After the caucus, only Vercruysse and Caleca returned to meet with the union negotiators. Vercruysse said that he could not accept the Union's proposal and that he would not make an offer of his own on behalf of Respondent. However, he did suggest that the Union make another proposal. Eaton responded that it was Respondent's turn to make a proposal, but Vercruysse insisted that the Union make another proposal, and he detailed what it should contain.

Vercruysse said that the Union should propose 45-cent driver-salesmen commissions on premium beer and 40 cents on subpremium beer; and 31 cents on all presell cases across the bargaining unit. The Union should further propose eight presell routes—four in the fall of 1992 and two more in each of the next 2 years; and a list of bulk stops naming four customers and two others of Respondent's choosing and other like stores. The Union's proposal should also contain the 40-hour weekly guarantee for warehousemen and the remainder of Respondent's August 6 proposal.

Eaton reiterated that it was Respondent's turn to make a proposal and, if Vercruysse thought what he had detailed was a good proposal, he should make it. Vercruysse declined to specifically make the proposal, but he said that, if the Union made it and backed it, he was ''sure he could get [Respondent] to accept it.''

When the Union declined to make his proposal, Vercruysse said that, on September 14, Respondent was going to implement its previous proposal—the so-called final proposal first made on August 6 and submitted the next day in written form. Eaton again protested that there was room for movement and stated that Respondent should continue to bargain and refrain from implementing anything. Vercruysse did not respond, except to say that the Union had 3 days within which to make another proposal.[4]

On September 14, the Respondent implemented its August 6 proposal with the exception of the presell and bulk sales provisions. Respondent implemented the latter on January 18, 1993. On September 29, 1992, the Union filed unfair labor practice charges against Respondent, alleging, in effect, that the Respondent had implemented terms unilaterally in the absence of a real impasse.

The parties met again on November 12. Attorney Wayne Rudell attended this meeting on behalf of the Union. Two Federal mediators also attended. At this meeting the Union indicated a willingness to accede to four presell routes over the term of the contract. This proposal, transmitted through the mediators, was rejected.

In addition, at this meeting, Rudell personally delivered to Vercruysse a handwritten request for information concerning Respondent's presell and bulk sales proposals. The information requested included, for each of Respondent's proposed presell routes, ''how many cases are projected to be involved,'' how ''much savings, if any, will result to the company,'' ''how many employees will be lost,'' and ''what categories of costs will be reduced.'' The Union also asked, with respect to bulk sales, the name and address of each store involved, ''number of cases'' at ''each account,'' number of employees that would ''lose employment,'' the ''categories'' and ''amount'' of costs ''to be saved.'' Finally, the Union asked ''the amount of increase or decrease of total wages each present driver/salesman will incur?''

Upon receiving the information request, Vercruysse said that Respondent would get back to the Union on the matter.[5]

[3] Mike Ryan joined the Respondent's negotiators after dinner and repeated Vercruysse's point about other people being willing to work under Respondent's proposal. This was apparently a caution to the Union that, in the event of a strike, Respondent could readily hire replacements.

[4] The above and all my findings as to the bargaining meetings are based in great part on undisputed testimony. Where there are conflicts I have favored the accounts of Eaton and Stebbins, which were essentially corroborative on important matters, except for the July 3 meeting that Stebbins missed. I found Stebbins to have been a particularly impressive and reliable witness, in part because he survived vigorous cross-examination by Vercruysse. On the other hand, I found Vercruysse, who decided to take the witness stand after having examined and cross-examined witnesses during the trial, to have lacked candor. His account was overblown with ramblings and opinion. It also conflicted in part with some of the assertions in President Mike Ryan's March 22, 1993 letter to the Union. I found particularly unreliable Vercruysse's testimony concerning the November 12 meeting which I discuss in more detail later. Unfortunately, he was unable to separate his role as a witness from his perceived function as an advocate. The only other witness for Respondent was Kennedy. His testimony was unhelpful because he testified mostly on background matters. When he did testify about the bargaining meetings (he missed the November 12 meeting as well as a crucial portion of the September 10 meeting), he failed to testify in any meaningful detail, in contrast to Stebbins and Eaton. Kennedy also gave some testimony in response to clearly leading questions from Vercruysse. Thus, except where corroborated or against interest, I cannot credit the testimony of Vercruysse or Kennedy. Nor can I give any significant weight, except under the same circumstances, to Respondent's typed bargaining notes, which were received in evidence. They were obviously abbreviated and self-serving; and they contained significant errors, such as, for example, failing to note the Union's presell offer.

[5] The exchange with respect to the information request is based on the credible testimony of Rudell, who was quite firm in adhering to this aspect of his testimony, particularly on cross-examination. Unlike Vercruysse, Rudell did not represent his client at the trial, al-

Continued

The Union received no response to its information request of November 12. As a result, on March 15, 1993, it filed a new and separate unfair labor charge asserting the unlawfulness of Respondent's failure to provide the information.

After receipt of a copy of the charge, Respondent, in a March 22, 1993 letter from its president, Mike Ryan, to Eaton, finally responded to the information request. Ryan stated that the Union was told, on November 12, that Respondent did not have the presell or bulk sales information requested by the Union because ''we were still in the planning stages.'' He also said that, on November 12, Respondent informed the Union that it would ''proceed planning for the installation of the presell portion of the contract.''

In the letter Ryan also stated as follows:

> On December 18, 1992, a meeting was held with the entire bargaining unit at Tom Ryan regarding the company's plans to implement the presell portion of the contract. At that time, much of the information you had requested was given to the union steward whom [sic] I assumed shared with you. Enclosed please find the agenda, content and handouts from that meeting. If you require additional information and we have it, we will, of course, share it with you.

Contrary to the assertion by Ryan, who did not testify in this proceeding, no attachments were included in the letter. No notation of enclosures was contained at the bottom of the letter, as is customary when any are enclosed, and none were submitted with the letter when it was offered in evidence or at any other time. In addition, Eaton's uncontradicted testimony is that he received no such attachments when he received Ryan's letter. Accordingly, I find that Respondent provided the Union with neither attachments nor information in its March 22 letter.[6]

Eaton responded in a letter dated April 7, 1993. He disputed being told on November 12 that the requested information was not available. He said instead—and he was right—that Respondent simply promised to review the information request for an appropriate response. He also criticized Ryan's assertion that Respondent provided the information in a December 18 meeting with employees. He said that delivery of the information to an employee union steward at that meeting was not tantamount to delivery to the Union. He said that he still had not received any of the information and also said that Ryan's letter contained no attachments, contrary to his assertion. Finally, Eaton renewed the information request and asked that the information be provided to him.

There is no record evidence of any further response by Respondent.

B. *Discussion and Analysis*

1. The impasse issue

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally implementing terms and conditions of employment unless it can demonstrate that it and the union that represents its employees have reached a valid overall impasse in negotiations. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). The burden of proving impasse falls upon the party asserting it. *North Star Steel Co.*, 305 NLRB 45 (1991). Impasse is a fact-specific determination that both sides, not just one, have decided that further negotiations would be futile. *Taft Broadcasting Co.*, 163 NLRB 475 (1968), enfd. sub nom. *Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *Teamsters Local 639 v. NLRB (D.C. Liquor Wholesalers*), 924 F.2d 1078, 1083–1084 (D.C. Cir. 1991); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982).

In the circumstances of this case, considering all of the evidence concerning the negotiations, I find that Respondent has failed to show that, on September 14, when it implemented its final offer of August 6 and 7, the parties had reached a valid impasse.

The most significant piece of evidence that negates a finding of impasse is what I will call Vercruysse's refracted offer made at the end of the September 10 bargaining session. I call it refracted because while he purported to make an offer for the Union, Vercruysse essentially confirmed that Respondent would be willing to accept that offer, thereby signaling probable movement beyond its final offer of August 6 and 7. This confirmation of movement beyond a previously submitted final offer is not unusual. For, in collective bargaining, as Judge Posner has observed, ''[a]fter final offers come more offers.'' *Chicago Typographical Union Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

Several other pieces of objective evidence support my finding that no impasse existed, even from Respondent's perspective. Operations Manager Kennedy testified that presell and bulk sales—issues that Respondent deemed important—were discussed only conceptually prior to August 6, the bargaining session that produced Respondent's final offer and the session before that in which Vercruysse declared impasse. It is unlikely that futility blanketed negotiations that had so recently focused on specifics. Moreover, in his March 1993 letter to the Union, President Mike Ryan said that the presell portion of the contract, which he identified as the issue that caused impasse, had not yet been ''installed'' by November 12 because ''much preparation'' was necessary. It was for this reason, Ryan suggested, that Respondent agreed to the November 12 meeting in order to try to resolve differences. He said nothing about the bulk sales issue or the labor cost issue generally causing the asserted impasse, which, after all, was declared by Respondent, not the Union. This counters the testimony of Vercruysse, who identified these other issues also as issues which separated the parties. Indeed, Ryan said that cost and other information on presell, the big impasse-causing issue, according to his letter, was not even available on November 12. Ryan's statements can only be viewed as confirming that presell and other issues had not been fully or sufficiently explored. In these circumstances, it is difficult to see how an impasse finding

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though he did subsequently file the Union's brief herein. This was also the only bargaining session he attended so his memory was focused. Vercruysse essentially corroborated Rudell, except in one important respect. He said that he told Rudell that the information Rudell requested had already been provided. No one corroborated Vercruysse on this point and I do not credit his testimony. My view is confirmed by reference to Mike Ryan's March 22, 1993 letter to the Union on this subject. Ryan said that the information requested on November 12 was not available at that time. He said nothing about it having been provided earlier.

[6] There is no complaint allegation that Respondent's December 18, 1992 meeting with bargaining unit employees, mentioned in Ryan's letter, was unlawful.

could be sustained, even under Respondent's view of the matter.

Respondent's declaration of impasse, in any event, is itself not determinative. Here, whatever Respondent's view of the situation, the evidence shows that the Union was not at the end of the line either on presell alone or bulk sales, reducing labor costs, or on any other issues in negotiations. The Union clearly stated that it had plenty of room for movement on September 10, the last time the parties met before Respondent declared impasse. This was not only based on the credible testimony of Eaton and Stebbins, but also the objective circumstances of the Union's bargaining posture. The Union never said that its September 10 offer was its final offer. Nor did the Union ever say, in response to Vercruysse's refracted offer, that it would never agree to presell or bulk sales. Indeed, Respondent's negotiator and operations manager, Tim Kennedy, testified that he thought the Union would agree to presell and bulk sales.

In this connection, I reject the Respondent's contention that presell and bulk sales were such important issues *to both sides* that a stalemate on those issues alone could cause a lawful impasse. Respondent itself emphasized that a reduction in labor costs, not necessarily presell or bulk sales, was what it was seeking. Vercruysse admitted as much in his testimony. The Union, on the other hand, did not think presell and bulk sales were important issues. Although it initially resisted on those issues, and sought, instead, increases in compensation and benefits, without presell and bulk sales, it was nevertheless willing to accept presell and bulk sales under some circumstances. Indeed, it made some presell and bulk sales offers, thereby showing its flexibility. When those offers were rejected by Respondent, the Union took another tack. On September 10, it tried to meet Respondent's expressed concern about labor costs by essentially dropping its economic proposals and calling for a 3-year freeze on labor costs. When even this failed, the Union, on November 12, came back to presell. It is plain, in these circumstances, that the Union was continually moving in the direction of agreement. And it was bargaining in good faith. There is no credible evidence from which I can infer that the Union believed further bargaining would be futile.

Other factors point to lack of impasse in this case. The parties only met eight times before impasse was declared. Actually, the first two meetings involved little more than an exchange of positions and proposals and only the last two involved more than conceptual discussions of presell and bulk sales, the issues that supposedly caused Respondent to declare impasse. Moreover, initially, the Respondent made regressionary proposals and the Union asked for significant increases. The parties were thus far apart and would need some time to resolve their differences. Nevertheless the parties narrowed their differences and were moving closer toward agreement. When Respondent prematurely declared impasse and implemented terms, the parties had only had one session with a mediator. Finally, there was no meaningful evidence of bargaining history that would permit the inference that bargaining under the circumstances presented in these negotiations could not have resulted in agreement.

Respondent makes much of the fact that, although the Union had made presell and bulk sales proposals before September 10, its offer on that date did not contain any such proposals. However, this fails to take into account the Union's flexible and good-faith approach to bargaining, and it fails to meet the overwhelming evidence of an absence of impasse which I have discussed above. To repeat, Respondent signaled further movement beyond its final offer on September 10. Moreover, presell and bulk sales were not mutually agreed upon make-or-break issues. The Union did not view them as such; and Respondent was interested in lowering labor costs, with or without bulk sales and presell. In any event, the Union never said it would never agree to any kind of presell or bulk sales. And, finally, the Union's change of position on September 10 was simply a good-faith effort to meet Respondent's labor cost concerns; the Union returned to presell on November 12 and asked, at that time, for detailed information on presell and bulk sales. It is ironic that Respondent attempts to base an impasse argument on presell and bulk sales when it failed to provide information on those very matters. As I find below, Respondent's refusal to provide such information was unlawful. And such unlawful refusal effectively precluded intelligent or further bargaining on presell and bulk sales. This is when bargaining stalled, and it stalled because of Respondent's unlawful refusal to provide information.

In these circumstances, I find that there was no contemporaneous understanding by both parties that further bargaining would be futile on and after September 10, 1992. Accordingly, I find that there was no impasse at that point and Respondent's unilateral implementation of terms thereafter was violative of Section 8(a)(5) and (1) of the Act.

2. The information issue

Respondent does not dispute the legal principle that an employer must provide a union, on request, with information necessary to its representative and bargaining functions if the information is relevant to those ends. The principle includes a broad discovery-type standard of disclosure. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Respondent has conceded that the Union's November 12 information request asked for necessary and relevant material. It contends, however, that the requested information had already been provided to the Union to the extent it was available (Br. 39). I reject this contention and find, instead, that the Respondent failed and refused to provide the information requested on November 12 and thus further violated Section 8(a)(5) and (1) of the Act.

It is undisputed that Respondent made no response to the November 12 information request until Ryan's March 1993 letter to the Union. Neither in that letter nor thereafter did Respondent provide the Union with the requested information. Respondent's defense—that the information was at once unavailable and had already been provided—is inconsistent and bizarre.

First of all, Respondent never took the position that the information requested on November 12 had previously been provided until the litigation phase of this case. As I have found, Respondent did not tell the Union on November 12 that such information had been provided earlier. Nor did Respondent state, in Ryan's March 1993 letter, that the material had previously been provided.

Moreover, the information was not shown to be unavailable, even though Ryan asserted in his letter that it was unavailable on November 12. Vercruysse made no such assertion when he was presented with the information request on

November 12. Nor did Respondent plead unavailability at any time between November 12 and Ryan's letter in March 1993, after the Union filed a charge over the Respondent's failure to provide the information. According to Ryan, as of November 12, Respondent was still in the planning stages for implementing presell. But, by that point, Respondent had made rather specific proposals on both presell and bulk sales, specific enough for it to have declared impasse on those issues. And it had implemented the rest of its final offer. To paraphrase the Supreme Court's views on a similar issue, if a claim is important enough to present in bargaining and to insist upon to asserted impasse, it is important enough to back up with supporting information. See *NLRB v. Truit Mfg. Co.*, 351 U.S. 149, 152–153 (1956).

Indeed, as I have earlier stated, if, as Ryan asserted, such necessary and relevant information was truly unavailable on November 12, it is difficult to see how there could have been an impasse in this case on any date prior to November 12. However, focusing only on the information issue and assuming Ryan's assertion of unavailability, Respondent is still not excused from providing the requested information. The Union's November 12 information request was a continuing one. Even if one assumed unavailability as of November 12, the information clearly became available thereafter. Ryan's letter states that the information, or at least some of it, was made available to employees and a union steward on December 18. Thus, whatever planning had been in effect on November 12 had progressed to the point on December 18 that certain information was available then. Indeed, by January 18, 1993, Respondent had implemented both presell and bulk sales. More precise information was obviously available at this point. Yet none was provided to the Union.[7]

Respondent's attempt to show compliance by referring to documents submitted to the Union at the July 3 bargaining session, some 4 months before the Union's November 12 request, is unpersuasive. The information provided at the July 3 meeting was in response to a different request and was addressed to a different purpose. At the time of the earlier request, the Union simply wanted to know, generally and conceptually, how presell and bulk sales would work. The possible presell routes submitted by Respondent were hypothetical, and the bulk sales information simply listed customers in order of volume with no supporting figures. No specific number of presell or bulk sales routes or stops were even on the table on July 3. Nothing more than conceptual presell and bulk sales discussions were held until Respondent's August 6 offer. In contrast, the November 12 information request was more specific. It asked for presell and bulk sales cost, volume and other data which clearly addressed the more concrete presell and bulk sales proposals Respondent made after July 3. It was clear by November 12 that the Union had not succeeded in meeting Respondent's desire to reduce labor costs, and it had returned to making a presell proposal of its own. Its information request was addressed not only to its need to intelligently bargain over Respondent's presell and bulk sales proposals, but to see if the cost savings of those proposals could be met in some other way. Respondent's failure to provide the information made it impossible to get to the essence of bargaining over labor costs, which, after all, were what Respondent wanted to reduce.

Respondent's strained attempt to show compliance by asserting that Kelly Stebbins had knowledge on July 14 and 15 of the information requested by the Union on November 12 is wholly unconvincing. Stebbins had not even attended the July 3 meeting at which Respondent provided the general and hypothetical information from which Respondent now asserts Stebbins could have divined the more specific information the Union wanted on November 12. But Respondent seeks to parse from Stebbins' testimony on cross-examination subjective knowledge of Respondent's cost, volume, and other data that would amount to ESP. Stebbins, an employee member of the Union's bargaining team, continually tried to tell Vercruysse, a labor lawyer and Respondent's chief negotiator who was cross-examining him, that his understanding of presell and bulk sales in the meetings of July 14 and 15 was general and conceptual. Vercruysse nevertheless tried to badger him into admitting he knew—from the documents submitted on July 3, from remarks made by Respondent's negotiators on July 14 and 15, and even from private conversations away from the bargaining table with Kennedy—the substance of what Respondent now contends was its response to the rather specific November 12 information request. Even apart from the wholly different information requests involved, Stebbins' knowledge on July 14 and 15 was speculative at best. Indeed, if, as Ryan said, the information was not even available on November 12, it is hard to see how Stebbins could have known about it on July 14 and 15.

Respondent's failure and refusal to provide information to the Union in response to its specific request of November 12 was unlawful. That information was not persuasively shown to be unavailable on November 12. But it was clearly available on December 18 and on January 18, 1993. Respondent's failure to provide it impeded bargaining and violated the Act.

CONCLUSIONS OF LAW

1. By unilaterally imposing the terms of its final offer of August 6, 1992 on September 14, 1992 and thereafter, thus changing terms and conditions of employment of unit employees, in the absence of a lawful impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

2. By failing and refusing to provide the Union which necessary and relevant bargaining information it requested on November 12, 1992, Respondent violated Section 8(a)(5) and (1) of the Act.

3. The above violations constitute unfair labor practices within the meaning of the Act.

THE REMEDY

Having found that the Respondent engage in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and to take certain affirmative action necessary to effectuate the policies of the Act. Respondent will be directed to restore the terms and conditions of the unit employees to the level in existence prior to the September 14, 1992, and subsequent unilateral changes, and con-

[7] A clear example of the ultimate availability of the information and Respondent's noncompliance is the following. On November 12, the Union asked for ''the amount of increase or decrease of total wages each present driver/salesman will incur.'' That information was never provided to the Union. Yet, in this proceeding, Respondent submitted documents in evidence that compared wages and pay of employees for similar 6-month periods before and after implementation of presell and bulk sales.

tinue them in effect until the parties reach either an agreement or a good-faith impasse. Respondent is also directed to make whole unit employees for all losses they may have suffered because of Respondent's unlawful conduct, with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Tom Ryan Distributors, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally imposing and changing terms and conditions of employment, in the absence of a lawful impasse.

(b) Refusing and failing to provide the Union with necessary and relevant bargaining information.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative in the following appropriate unit:

> All full-time and regular part-time driver/salesmen, helpers, semi-drivers, pre-sell drivers, and beverage warehousepersons, including hi-lo operators, hand loaders, mechanics, and reclamation employees employed by Respondent at its Flint facility; but excluding guards and supervisors as defined in the Act.

(b) Provide the Union with information requested by it on November 12, 1992, and any other necessary and relevant information requested by it.

(c) Restore to the unit employees the terms and conditions of employment that were applicable prior to September 14, 1992, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining. Nothing herein shall require the rescission of benefits granted after September 14, 1992.

(d) Make whole the unit employees for any losses they may have suffered because of the unlawful imposition of and changes in terms and conditions on and after September 14, 1992, with interest as set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Flint, Michigan, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally impose and change terms and conditions of employment, in the absence of a lawful impasse.

WE WILL NOT refuse and fail to provide the Union, Local 332, International Brotherhood of Teamsters, AFL–CIO, with necessary and relevant bargaining information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative in the following appropriate unit:

> All full-time and regular part-time driver/salesmen, helpers, semi-drivers, pre-sell drivers, and beverage warehousepersons, including hi-lo operators, hand loaders, mechanics, and reclamation employees employed by Respondent at its Flint facility; but excluding guards and supervisors as defined in the Act.

WE WILL restore to the unit employees the terms and conditions of employment that were applicable prior to September 14, 1992, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining. This does not require rescission of benefits granted after September 14, 1992.

WE WILL make whole the unit employees for any losses they may have suffered because of our unlawful imposition

of and changes in terms and conditions of employment on and after September 14, 1992, with interest.

WE WILL provide the Union with information requested by it on November 12, 1992, and any other necessary and relevant information requested by it.

TOM RYAN DISTRIBUTORS, INC.